SUPREME COURT, U. S.

MAR 23 1967

JOHN F. DAVIS, CLERK

No. 1182

IN THE

SUPREME COURT OF THE UNITED STATES.

STATE OF TENNESSEE, ex rel., etc.,
Appellants,

vs.

CITY OF CLARKSVILLE et al.,
Appellees.

On Appeal from the Supreme Court of the State of Tennessee.

JURISDICTIONAL STATEMENT.

DENNEY, LEFTWICH, LACKEY & CHERNAU,
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CITY OF CLARKSVILLE et al.,
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On Appeal from the Supreme Court of the State of Tennessee.

JURISDICTIONAL STATEMENT.

The appellants, The New Providence Utility District, The Edgoten Utility District, The Woodlawn Utility District, being public utility districts created and operating under statutes of the State of Tennessee, W. H. Burney, doing business as the W. H. Burney Trailer Courts, Morrison Estates, Day Development Company, Rose Hill Estates, Clay R. Caroland, Charles C. Gentry, A. J. Darnell, Houston Wade, T. W. Taylor, Donald W. Trice, Frank J. Graham, Mrs. C. T. Edgar, F. C. Ratchford, R. W. Ellis, A. C. Ausbrooks, E. L. Hodges, Graham R. Bryant, Steve L. Kondwros, B. B. Darden, Floyd Ferrell, Monroe Walker, Cecil Watson, Jesse Chandler, Jr., Harold A. Senseney, John T. Ervin, Elton Atkins, J. S. Holmes, Robert E. Clark, Robert E. Ashby, Joseph A. Nagey, N. E. Morgan, Billy Emmett, Dave W. Metcalfe, Orman Gray, C. C.

Walton, W. J. Pollard, Mrs. G. C. Adkins, James Lehman, James Morgan, Les Thebedeau, Richard A. Dewkes, Mrs. James Scott, and Ethridge Mann, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Tennessee dismissing appellants' bill, said judgment having been entered on December 20, 1966, and appellants having been granted a thirty-day extension from February 25, 1967, to and including March 27, 1967, to file the record and jurisdictional statement in this cause.

CITATION TO OPINION BELOW.

The Supreme Court of Tennessee rendered a written Opinion, which was filed on November 14, 1966, and a petition to rehear was denied on December 20, 1966. Neither Opinion was reported officially. A copy of each Opinion is appended hereto and appears at pages 28 and 37 in the Appendix.

JURISDICTION.

The judgment sought to be reviewed herein was rendered and entered on December 20, 1966. The jurisdiction of the Supreme Court of the United States to review the decision of the Tennessee Supreme Court by direct appeal is invoked under and conferred by Title 28, U. S. C. A., Section 1257 (2).

QUESTIONS PRESENTED.

1) Did the Tennessee Supreme Court err in failing to find that the Ordinance adopted by the City of Clarksville, Tennessee, known as Ordinance No. 16-1964-65, entitled "An Ordinance to Annex Certain Territory and to Incorporate Same Within the Corporate Boundaries of the City of Clarksville", adopted under authority of Chapter 113 of the Tennessee Public Acts of 1955, as amended, Tennessee Code Annotated, Sections 6-309, et seq., violates

Article I, Section 10, of the United States Constitution, and impairs the obligations of the Contracts entered into between the three utility districts, parties complainant, and the bondholders of bonds issued by such districts, some of which are also parties complainant?

2) Did the Tennessee Supreme Court err in failing to find that the Ordinance above referred to, together with the Tennessee Statutes under which the same was adopted, violate the Fourteenth Amendment to the Constitution of the United States, in that they deprive the bondholders holding bonds issued by such utility districts, of their property and property rights without due process of law?

STATUTES INVOLVED.

TCA-6-309, 6-310, and 6-318, made a part of the Appendix, at Pages 46-49.

Said Statutes referred to empower municipalities to incorporate other territory into the municipality without referendum to the citizens of the annexed area, which may be done by an incorporating municipality on its own initiative, by ordinance only, "when the territory will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered," unless said annexation is effected. There are certain limitations in regard to area and population not material here; the governing body of a municipality shall adopt a plan of service, setting forth the area to be incorporated; the projected timing of the municipal services to be furnished the annexed area; and providing that before such plan of service is adopted, it must have been submitted to a local Planning Commission.

STATEMENT OF THE CASE.

Appellants, New Providence Utility District, Edgoten Utility District, and the Woodlawn Utility District, are nearby quasi municipal corporations to the appellee, City

of Clarksville. By municipal ordinance the City of Clarksville, Tennessee annexed a large territory contiguous to its municipal limits comprising an area of approximately 10.3 square miles, nearly fifty percent of which is devoted to agricultural purposes, and including approximately ten thousand residents under the authority of the Statutes heretofore referred to. This action was taken without referendum and over the protest of the three appellant utility districts, bondholders, and a large segment of the proposed annexed community.

The appellants filed their original bill in the Chancery Court of Montgomery County, Tennessee, in which they attacked the ordinance in question, on the grounds that said annexation ordinance may not reasonably be deemed necessary for the welfare of the residents of the affected territory and the municipality as a whole, and so constitutes an exercise of power not conferred by law; that the same was unreasonable and not within the power of the City to enact, was done capriciously, arbitrarily, oppressively, and illegally, in that the services that the appellee, City of Clarksville, could render were already being rendered by the Utility Districts in respect to water and sewerage, and the County was furnishing schools, police and highway services.

The appellee, City of Clarksville, provided a tax rate of $1.80 and did not propose to render any services that that Utility Districts and County were not rendering, but proposed to tax the people of the area, resulting in the collection of taxes but not in the improvement of the services which had been built out of funds provided by the Districts, either in loans or comparable rates to pay for the water and sewer systems installed in the area.

The original bill attacked the validity of the ordinance on the ground that it violated Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States (R. 20).

The question of whether or not the proposed annexation be unreasonable, considering the health, safety and welfare of the citizens and property owners in the proposed annexed area, is a "fairly debatable question." This is decision law and not provided for in the statute, and by such decisions the Courts of Tennessee have interposed "the burden on the protestants of showing that it is not 'fairly debatable'," and such decisions make such statute invalid and unconstitutional. **Morton v. Johnson City (1960)**, 206 Tenn. 411, 333 S. W. 2d 924; **Knoxville v. State ex rel. Graves (1960)**, 207 Tenn. 558, 341 S. W. 2d 718; **State ex rel. Campbell v. Morristown (1960)**, 207 Tenn. 593, 341 S. W. 2d 733; **State ex rel. Senff v. Columbia (1961)**, 208 Tenn. 59, 343 S. W. 2d 888.

Upon the trial of the case the Chancellor held, among other things, that the propriety of the annexation was a "fairly debatable" subject. The Trial Court stated in its Opinion that:

> "In the case at bar, there was testimony pro and con as to the advisability of the City annexing the proposed area, and as this Court views the decisions of our Supreme Court, it cannot weigh the evidence and determine where the preponderance of the evidence lies, but can only decide whether or not a debatable question is presented. There was testimony from both expert and lay witnesses that no adequate provisions are at the present made for police and fire protection, while, on the other hand, there is testimony that adequate provisions have been and are being made. Thus, it is clear that a debatable question exists, and that being the case, under the authority of Morton v. Johnson City, supra, it is the duty of this Court to so find. In most respects the question raised in the case at bar are identical with the Johnson City case, and the same reasoning applied in that case applies in this case" (R. 123-132).

The Trial Court dismissed appellants' bill and appellants' petition to rehear. On appeal the Supreme Court of Tennessee affirmed the Trial Court's judgment, and likewise denied the petition to rehear when the Court's attention was called to the fact that they had failed to pass upon the constitutional issues raised, and the Supreme Court filed an Opinion wherein it stated that the question of constitutionality of a statute "may be raised for the first time by a petition to rehear" (R. 176-178).

We should remind this Court that the Trial Court, in recognizing the question of whether or not the three ufility districts would continue to provide certain services or whether or not by negotiations between the utility districts and the City who would take over those facilities, in no way affects the validity of the annexation. The Trial Court makes no provision for any assurance that the City of Clarksville shall assume the operations and acquire the property of the utility districts and assume the debts of the utility districts, but simply states that the statue provides that the contract rights vested in the holders of outstanding bonds or other obligations shall be fully preserved, but it does not say "how, when or where," and the plan and the ordinance of annexation were both silent on the subject of "how, when, and where."

The statute provides that this annexation shall not impair the obligations of a contract, but neither the plan nor the judgments of the Court make any provision for the protection of those who hold contracts, such as bondholders and others. Actually, the City can proceed to collect taxes and leave the services to the utility districts who will pay for these services by high rates imposed upon the residents.

Following the Opinion of the Supreme Court of Tennessee on December 20, 1966, appellants on December 27, 1966 filed a motion with that Court to issue a Stay Order, alleging therein that the services of the three utility dis-

tricts, Edgoten, Woodlaw and New Providence, were being completely disrupted and no funds were being made available for operation, and that "the bondholders in these districts have no one to look to for the indebtedness owing them;" that the City of Clarksville had made no offer or overture for continuing the services, or any arrangement to take over the services and assume the bonds; that at that time there was no adequate water supply from the City of Clarksville to New Providence; that no one in authority, such as the Mayor of Clarksville, had conferred with the Commissioners of these utility districts to make an orderly transition between the four governments; that the citizens of these districts were frustrated, did not know to whom they should pay their utility bills, and that, in fact, forty of their customers resided beyond the territory annexed. Moreover, the eleven employees of the New Providence Utility District did not know their status or who would pay them; that the sole effort of the City of Clarksville in finalizing this transaction was to make it possible for them to assess taxes as of January 10, 1967; that the affected area to be assessed with taxes would have no assurance of any service, and, further, in relation to the matter, there are bonds for the sewer system outstanding in the sum of approximately a Million and one-half Dollars, and bonds outstanding on the water system of approximately an equal amount, with no provision suggested by the City of Clarksville to provide funds for the payment of interest on said bonds, and no provision for the utility districts to have any available revenue (R. 180-183).

The Tennessee Supreme Court denied the motion to stay, stating that it failed to see how appellants would be irreparably injured, and further that "the plan of the City is obvious in the event the judgment is stayed and the Supreme Court of the United States refuses to entertain the petitioner's appeal!" (R. 186). Actually, as shown in the Record, taxes are assessable as of January 10, 1967,

and the three appellant utility districts are maintaining the service now out of uncertain and nervous income, and from that date there will be a lien on the property of the residents in the annexed area for the collection of taxes.

THE QUESTIONS ARE SUBSTANTIAL.

The Tennessee Supreme Court has decided an important question concerning the constitutional rights of certain citizens of Tennessee, which question has not been, but should be, settled by the Supreme Court of the United States. It is without contradiction that the City of Clarksville ordinance and resolution, and plan of services adopted by said resolution, did not provide for the assumption of the liabilities and obligations of the Edgoten and Woodlawn Utility Districts.

The ordinance adopted by the City of Clarksville, Tennessee, known as Ordinance No. 16-1964-65, entitled, "An Ordinance to Annex Certain Territory and to Incorporate Same Within the Corporate Boundaries of the City of Clarksville," which was adopted under authority of Chapter 113 of the Tennessee Public Acts of 1955, as amended, Tennessee Code Annotated, Sections 6-309, et seq., violates Article I, Section 10 of the United States Constitution, in that it impairs the obligation of the contracts entered into between the three utiilty districts, New Providence, Edgoten and Woodlawn, and the bondholders of bonds issued by such districts. The ordinance gives no enforceable legal right to the bondholders nor to the utility districts, Edgoten and Woodlawn, which obtain services from the New Providence Utility District, and further, the ordinance provides no plan for the services of these small districts which are now losing their source of water and sewerage services, and which will not have enough customers left to operate economically, and thus the customers in the Edgoten and Woodlawn Utility Districts will be completely deprived of these necessary services. There is no

provision in the ordinance or plan of service for a continuation of services to Edgoten and Woodlawn Utility Districts.

The resolution simply states that water services based on city rates will be provided within sixty days after legal incorporation of the utility district into the city system. There are three utility districts affected, and parts of the water lines and assets of the districts are included in the annexed area, while other parts of such lines and assets are outside of the area, the result being a severance of such districts.

The Contracts made by the districts with bondholders, as well as Contracts with all others dealing with the districts, will be impaired and rendered inoperative. The Contracts made by the districts to serve customers located outside of the annexed area, cannot be fulfilled since the districts cannot continue to serve such customers under rates provided for retirement and payment of bonds issued to finance such systems.

Your appellants respectfully insist that the bonds which constitute a certificate of indebtedness are jeopardized and that the Ordinance and Resolution and the plan of services adopted by the annexing municipality does not even mention the Edgoten and Woodlawn Utility Districts. No obligation is placed on Clarksville to protect the Edgoten and Woodlawn Utility Districts.

Your appellants are aware that the enlargement of cities by annexation of additional territory is exclusively a State matter, but in this case the bondholders of Edgoten and Woodlawn Utility Districts cannot be considered protected by the Tennessee Statute, which states that contracts shall not be impaired, when, in fact, the Edgoten and Woodlawn Districts, which obtain their entire supply of water from the New Providence District and who are entirely dependent upon the New Providence District, are not in-

cluded, in any manner, in the process effectuating annexation.

Tennessee Code Annotated, Section 6-318, states in part that:

> "If the annexed territory is then being provided with a utility service by a state instrumentality which has outstanding bonds or other obligations payable from the revenues derived from the sale of such utility service, the agreement or arbitration award referred to above shall also provide (a) that the municipality will operate the utility property in such territory and account for the revenues therefrom in such manner as not to impair the obligations of contract with reference to such bonds or other obligations, or (b) that the municipality will assume the operation of the entire utility system of such state instrumentality and the payment of such bonds or other obligations in accordance with their terms. Such agreement or arbitration award shall fully preserve and protect the contract rights vested in the holders of such outstanding bonds or other obligations."

Is this Statute, however, made constitutional by the Legislature simply stating that the annexation shall not impair the obligation of contracts? Does this provision of the Tennessee Code Annotated, in and of itself, render the Statute constitutional, when in fact the action taken by the City in this annexation process does in fact impair the contracts of the utility districts?

It is respectfully submitted that the mere provision of the Statute does not in itself make the Statute constitutional, but rather the effect of the statute, legislative act or ordinance, determines its constitutionality, and mere words incorporated in the statute prohibiting impairment certainly cannot prevent the statute or ordinance from effectively impairing contracts, if, in fact, that is the effect brought about by the annexation process.

In addition, the bondholders holding bonds issued by the utility districts are deprived of their property and property rights without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States.

The Tennessee annexation statute provides that in testing the validity of the annexation the question is whether or not the proposed annexation be unreasonable, in considering the health, safety and welfare of the citizens and property owners in the proposed annexed area. The case law of Tennessee has placed the burden on the protestants of annexation to show that the proposed annexation does not create a "fairly debatable" question.

The Tennessee Supreme Court has stated many times that they will not review questions of justice of annexation proceedings, adaptability of territory annexed, or propriety of annexing it, so long as the legal requirements are carried out and the act is done within the constitutional provisions. They have held that the main issue in these annexation suits is not whether or not the ordinance annexing property was reasonable or unreasonable, but rather whether or not it is a "fairly debatable" question as to whether or not the ordinance is reasonable or unreasonable (See cases, supra).

A protestant of annexation, by the mere fact that he protests, creates a debatable question and, therefore, he who protests annexation, by virtue of his protesting, creates the question that in effect precludes him from having the Court undertake the duty of judging the constitutionality of the annexation.

By causing the determinative question to be whether or not a "debatable question" exists, prohibits a protestant from having any determination as to whether or not the legal requirements of annexation are, in fact, carried out.

No such burden is put upon a protestant anywhere else in the law of the land, and such a burden is unfair, arbitrary and unreasonable. A protestant of annexation, under the decisions of Tennessee, is penalized by reason of his very protestation.

CONCLUSION.

For the reasons stated, appellants submit, and it is respectfully urged, that the sound administration of justice supports the conclusion that the annexation ordinance referred to herein violates the provisions of the United States Constitution.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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March 17, 1967.

Certificate of Service.

I, Stanley M. Chernau, one of the Solicitors for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that copies of the foregoing Jurisdictional Statement and Appendices were this day served on adverse parties herein, in accordance with Supreme Court Rules 33 and 13, by personally delivering and depositing the same with Edwin F. Hunt, Boult, Hunt, Cummings & Connors, Nashville, Tennessee, and Frank J. Runyon, Runyon & Runyon, Clarksville, Tennessee.

Stanley M. Chernau.